

Introduction

The development of legal issues in the workers' compensation arena typically follows a pattern of Legislation, adoption of rules by the Administrative Director or the Workers' Compensation Appeals Board (for primarily procedural changes) for implementation and finally legal challenges by the interested parties to the system to clarify the interpretation of the legislation and or rules adopted to implement the legislation. Some legislation does not require adoptions of rules for implementation and can move immediately into the legal challenge mode to obtain clarification.

An example of legislation that required rules by the Administrative Director would be implementation of the Medical Provider Networks authorized under Labor Code § 4616. Since the Labor Code required the Administrative Director to promulgate rules and approve the networks, nothing could happen until the regulations had been adopted. Rules were adopted to implement the MPN program and has since been revised and updated.

An example of legislation that does not require adoption of Regulations would be Labor Code § 4663 on apportionment. The interpretation of this statute would be made by the WCAB as parts of its duty to interpret the labor code and the administration of benefits to employees. The same would be true of Labor Code § 5814 on penalties as the WCAB is the primary judicial interpreter of when such penalties apply and how to apply the statutes to specific fact patterns presented to it.

In a sense both the process of adopting regulations and the process of obtaining clarification through legal challenges allow for input from different sources to be considered by a neutral party interested in providing a specific implementation of a statutory directive from the legislature into the overall scheme of workers' compensation.

The rule making process requires the Administrative Director to solicit and consider information, opinions and argument from the public, including the various interest groups, into the rules that will be used to implement the legislative directives.

In the Litigation system the parties present their arguments on the interpretation of the law as it applies to specific facts to a neutral party, the Workers' Compensation Administrative Law Judge (WCJ). This process relies on the adversarial process of litigation to provide the WCJ with available options and sufficient information and analysis to make a decision on how to apply the legislative directives to the facts of a specific case. The decision of the trial judges can then be challenged at increasingly higher levels of judicial authority until ultimately the California Supreme Court can be asked to rule on the lower court's interpretation. Typically the process of obtaining clarification of legal principles in the litigation process takes a matter of years as cases must work their way to trial and decision by a WCJ, followed by an appeal to the

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Workers' Compensation Appeals Board itself, possibly followed by appeal to the Courts of Appeal and finally consideration by the Supreme Court. At each succeeding level the review becomes more legally refined and the likelihood of a party obtaining review becomes increasingly less likely. In general, the higher the court that issues a decision, the more significant the decision has as legal precedent to bind lower courts to follow the decisional law.

Two areas that are likely to involve significant increased litigation over the next several years are Permanent Disability, specifically the litigation over rebuttal to the newly adopted PD Schedule and Apportionment.

One of the specific directives in the adoption of the schedule was to create "consistency, uniformity and objectivity" (LC 4660). The purpose of efforts to sidestep the schedule and litigate the issue of wage loss is to avoid the very purpose of the schedule, to reduce litigation of Permanent Disability by making the schedule more consistent and objectively based. This effort could end up being substantially eroded with the current efforts to introduce evidence to avoid application of the PDRS.

Apportionment has traditionally been fertile ground for litigation. The Legislature has changed the prior rules on apportionment and therefore a completely new set of rules, developed through case law, will have to emerge to clarify the application of the new statutes. It is probably impossible to completely change the statutes on apportionment and not expect a substantial amount of litigation, requiring years of developing case law to be the result. The case law before SB 899 took almost 30 years to fully develop. We can anticipate a good deal of litigation on this issue. If the current decisional case law holds up in the Gallo Glass Co v WCAB (Dykes), case, and if this concept is expanded to cases beyond those specifically identified in Dykes, then the employer community may find much of the effort to obtain the benefit of apportionment to prior awards of PD to be a hollow victory.

The following is a brief outline of the issues identified as being significant in the most recent rounds of Legislative activity from 2002 until 2004 including AB 749/AB486, SB 228/AB227 and SB 899 in order of importance as defined by potential costs saved or to be incurred by the overall system. The initial outline is followed by a more comprehensive discussion of each issue organized by the Legislative package that addressed the issue.

OUTLINE BY ORDER OF PRIORITY:

ISSUE 1: Impact of the Utilization Review time limits in applying Utilization Review decisions to medical care. This issue has been pending at the Court of Appeals for several months in Sandhagen v WCAB. Given the very tight time frames for completing and communicating UR decisions,

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strict interpretation of the UR timeframes will result in increased costs to implement UR.

- ISSUE 2: Application of ACOEM Guidelines to injuries beyond 90 days:** The WCAB has generally applied ACOEM regardless of how long after the injury. Trial judges tend to issue findings that ACOEM does not apply beyond 90 days. The WCAB is developing case law that suggests that while the guidelines will still apply beyond 90 days that the applications is more flexible and less structured thereby allowing more treatment than is generally identified in ACOEM. In general, the further the employee gets from the date of injury, the less significant the ACOEM guidelines become. Adoption of the Medical Treatment Guidelines by the Administrative Director, as required by statute, could help to resolve this issue and provide treatment guidelines that cover a longer time frame from the date of injury.
- ISSUE 3: Presumption for American College of Occupational and Environmental Medicine Medical Treatment Guidelines: Application Date:** This issue is currently pending at the Court of Appeals. This issue involves use of ACOEM to review, approve and or deny treatment provide before the effective date of the presumption on 3/22/04. A decision can be expected sometime before mid 2006.
- ISSUE 4: Retroactive Application of provisions of SB 899.** The Appellate courts have provided a very solid basis to apply all of the provisions of SB 899 that do not have a separate implementation date to all aspects of Workers' Compensation. This issue is now settled
- ISSUE 5: Ability to transfer existing claims into MPNs:** The Administrative Director's rules make transfer into the MPN for existing cases a reality. It is anticipated that legal challenges will be made to the Administrative Director's authority to allow transfer of existing cases into an employer or carrier's MPN.
- ISSUE 6: Effective date of repeal of presumption for primary treating physician:** The PTP presumption was identified as one of the primary cost drivers of medical care from 1994 to 2003 when the presumption was substantially modified. Given the language in Section 46, the application of the repeal of this section was mandated for existing cases. This was confirmed by the WCAB in and *en banc* decision.
- ISSUE 7: Interpretation of "existing Order, Decision or Award of the Workers' Compensation Appeals Board:** This issue helped to determine how many existing cases will be affected by SB 899. The courts have used the

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rule of “finality of decisions” to apply SB 899 provisions to all cases without a final decision. This issue is substantially settled.

- ISSUE 8: Ability to rebut the Permanent Disability Rating Schedule (PDRS) that went into effect on 1/1/2005:** The ability to rebut the PDRS and obtain ratings based on wage loss concepts is just being explored but has the potential to significantly increase the exposure for PD benefits. Cases are currently pending where this issue is being raised. Has the potential to substantially increase litigation costs and Permanent Disability benefits in some cases.
- ISSUE 9: New definition of apportionment to “causation:** WCAB has provided expensive definition of what “causation” means in Labor Code § 4664. Anticipate much more litigation over details of application of how to develop record to prove apportionment
- ISSUE 10: Calculation of apportionment to pre-existing Awards:** Current case law authority is conflicting. Has the potential to wipe out apportionment under Labor Code § 4664 as a meaningful issue for employers.
- ISSUE 11: Application of revised statutes on apportionment to existing cases:** Kleemann v WCAB provided for application of apportionment to existing cases that are not final. This issue is now settled.
- ISSUE 12: Application of amended Labor Code § 5814:** Case authority now holds that amended Labor Code § 5814 applies to all claims as for effective date 6 1 04. System has already experienced a dramatic drop in claims for penalty.
- ISSUE 13: Effective date of use of the new Permanent Disability Rating Schedule under Labor Code § 4660:** Which claims, where injury occurred prior to 1/1/05 will be evaluated using the pre-1/1/05 PDRS and which will use the AMA Guides. Use of AMA Guides will generally result in significant overall savings in Partial Permanent Disability Awards.
- ISSUE 14: Apportionment under Labor Code § 4664 for a prior Award where the new Award is under AMA guides:** Since the old and new systems use both different methodology for calculation of PD and different standards, how will prior awards be credited against new awards?
- ISSUE 15: Prospective application of Vocational Rehabilitation Settlement:** This issue is final and was resolved in favor of being able to settle VR benefits for all claims regardless of the date of injury.

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- ISSUE 16: Ability to settle Supplemental Job Displacement Benefits:** Since use of SJDB is not anticipated to be widespread, that ability to conclude liability is important for employers to be able to close files completely. Current rules allow for settlement of this benefit.
- ISSUE 17: Lack of a Permanent Disability Award on entitlement to supplemental job displacement benefits:** If and how to calculate the value for SJDB vouchers where there is no PD award. Labor Code only requires payment of voucher where there is an award of PD and there is no procedure for requesting a determination of WCAB on PD after case is settled by Compromise and Release.
- ISSUE 18: Amendment to Labor Code § 3207 Removing Vocational Rehabilitation:** Definition of compensation no longer includes Vocational Rehabilitation. Has potential impact in application of penalty statutes to VR benefits as Labor Code § 5814 provides for penalty to be awarded for delay in payment of “compensation”.
- ISSUE 19: Pre-designation limitation to Primary Care Physician:** Proposed regulations limit use of predesignation to small pool of physicians and prevents injured workers from predesignation of non primary care physicians. Has potential to increase number of employees to be treated in MPN
- ISSUE 20: Obtaining medical-legal evaluations in represented cases for injuries prior to 1/1/05:** 2 cases on this issue are currently pending in Appellate Courts. Potential to reverse existing case law and require more restrictive medical legal process for obtaining medical legal examinations in existing cases not just claims of injury after 1/1/05
- ISSUE 21: Administration of vocational rehabilitation when portions of the statutory provisions have been repealed:** The subject to a WCAB Significant Panel decision with instructions to use now repealed statutes in Labor Code § 4635 to 4646.
- ISSUE 22: Definition of 50 employees for purposes of Labor Code § 4658(d) (2):** Will define application of 15% adjustment to PD.
- ISSUE 23: 15% Increase/Decrease of Permanent Disability Award: Identification of Permanent and stationary dates:** Since many times the P & S opinion is received long after the actual date, the ability to offer alt/mod/regular work within 60 days will be affected. Current proposed rules do not provide any guidance to this issue.

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- ISSUE 24: Calculation of Retroactive or Delayed Vocational Rehabilitation Maintenance allowance benefits:** Issue is whether repeal of Labor Code § 4646 and adoption of Labor Code § 139.5 will eliminate payment of past due and delayed VR benefits at TTD rate (maximum rate of \$840) v VRMA rate (maximum rate of \$246)
- ISSUE 25: Ability to pre-designate a chiropractor or acupuncturist pursuant to Labor Code § 4601 where employer has MPN:** Could result in significant additional leakage from MPNs if allowed. Proposed rules limit designation of personal chiropractor to non MPN situations.
- ISSUE 26: Ability of chiropractor to remain as primary treating physician after completion of 24 visits:** What happens to chiropractor as primary treating physician when 24 visit cap (applicable only to post 1/1/04 injuries) is reached?
- ISSUE 27: Obtaining medical-legal reports in multi-party cases and multi-injury cases:** None of statutory rules address issue of medical legal examinations in multi-party cases, contribution issues etc.
- ISSUE 28: Commencement of Increases in Life Pension Benefits for Permanent Total Disability Cases:** Technical question for calculation of benefits where life pension is awarded when to include COLA for calculating increases.
- ISSUE 29: Extension of Dependency Benefits for Mentally or Physically Incapacitated Child of Any Age for Life:** Clarification of how to identify those might qualify for this benefit
- ISSUE 30: Dependency Benefits Payable to Estate of Injured Worker:** Potential constitutional issue on whether legislature has power to direct payment of benefits to estate of deceased worker.

OUTLINE AND SUMMARY IN TIME ORDER

AB 749/SB 486 Issues:

ISSUE: Dependency Benefits Payable to Estate of Injured Worker.
Labor Code § 3501(c)

DISCUSSION: Labor Code § 3501(c) was amended to provide that where an industrial injury resulted in the death of an injured worker and there was no dependent for the injured worker, a payment of \$250,000.00 would be payable to the estate of the

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deceased worker (this provision would be effective 1/1/04). Labor Code § 4706.5, which requires payment of a single dependency benefit to the Department of Industrial Relations, Death Without Dependents Unit was not repealed where the same circumstances occur. Consequently, where the injured worker leaves no dependent payments are potentially up to \$375,000.00 for a single injury whereas for three actual dependents the maximum expenditure prior to 1/1/2006 is \$160,000.00 and after that date is \$320,000.00.

The California State Constitution provides that the legislature may make provision for payment of benefits to injured workers and their heirs and dependents but makes no provision for payment to the estate of a deceased employee. Therefore, the issue arises as to whether this provision has a constitutional basis and if the legislature exceeded its power in passing this provision.

STATUS: This case must be decided at the Court of Appeals level as there is no provision for the WCAB either at the trial level or on reconsideration to review constitutional issues. There are currently no cases which have addressed this issue.

IMPACT: Very minor, given the small number of dependent death claims that arise each year, this provision is anticipated to have a very minor overall impact on workers' compensation benefits.

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ISSUE: Commencement of Increases in Life Pension Benefits for Permanent Total Disability Cases.
Labor Code § 4453(c)

DISCUSSION: Labor Code § 4453(c) provides that all life pension cases shall be increased annually based upon the increase in the "state average weekly wage (SAWW)." The issue arises as to when this increase will begin. It is to occur on an annual basis with the increase in state average weekly wage as calculated under Labor Code § 4653(a). The question arises whether the increases for Permanent Total award (which are paid at the temporary disability rate for life) are calculated from the date of injury with each annual COLA being calculated or do the increases commence upon the injured employee becoming permanent and stationary and the disability award commences. For awards of Permanent disability that are less than 100%, the issue is whether the injured worker's life pension, which begins after the Permanent disability award has ended, is to include COLA increases occurring between the P & S date and the commencement of the life pension or are increases calculated solely after the life pension begins

STATUS: There are no pending cases on this issue.

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IMPACT: This is anticipated to have minor impact on overall workers' compensation costs, as it affects a very small number of cases and even in those cases only affects a small portion of the overall Award.

ISSUE: Prospective application of Vocational Rehabilitation Settlement
Labor Code § 4646(d)

DISCUSSION: AB 749 provided that prospective Vocational Rehabilitation benefits could be settled in cases where the Injured Worker was represented. The issue was almost immediately raised as to whether this benefit could be resolved for claims where the date of injury occurred prior to 1/1/2003, the effective date of the section.

STATUS: The Court of Appeals in Pebworth v. WCAB (2004) 116 Cal. App. 4th 913, 69 Cal. Comp. Cases 199 reversed a WCAB determination that this section would not be applied to injuries occurring prior to 1/1/03 and held that it applied to all existing cases.

IMPACT: Moderate reduction in overall cost for vocational rehabilitation benefits, as many injured workers elected to settle cases rather than participate in vocational rehabilitation plans. Potentially eliminated issues involving retroactive benefits by having injured workers defer initiation of rehabilitation benefits by agreement. Reduction in frictional costs to system over litigation of VR entitlement.

ISSUE: Extension of Dependency Benefits for Mentally or Physically Incapacitated Child of Any Age for Life:
Labor Code § 4035.01 and 4703.5

DISCUSSION: These provisions extend the payment for a child, of any age, found by any trier of fact whether contractual, administrative, regulatory or judicial to be physically or mentally incapacitated from earning to be conclusively presumed as wholly dependent upon support for the deceased employee parent with whom the child is living at the time of the injury resulting in death or for whose maintenance the child was legally liable at the time of injury resulting in the death of the parent. The provision of Labor Code § 4703.5 provides that a qualifying dependent shall continue to receive temporary total disability benefits until they are no longer incapacitated or until they die under these circumstances. What has yet to be decided is what the criteria is for physically and/or mentally incapacitated from earning to qualify for total disability as well as what the requirements are for the enumerated trier of fact determinations to qualify for such benefits.

STATUS: No pending cases addressing this issue

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IMPACT: Minor impact, given the small number of cases potentially made eligible under this provision.

SB228/AB227 Issues:

ISSUE: Ability of chiropractor to remain as primary treating physician after completion of 24 visits.
Labor Code § 4604.5(d).

DISCUSSION: Labor Code § 4604.5(d) provided a lifetime cap on chiropractic treatments and physical therapy visits (extended to occupational therapy visits in SB899) of 24 visits per injury. Since chiropractors are defined as physicians under Labor Code § 3209.3 and capable of serving as a primary treating physician, the question arises as to what status a chiropractor would have once the 24-visit limitation is reached and whether the chiropractor can continue to be paid for providing maintenance services as a primary treating physician.

STATUS: No case is pending.

IMPACT: Relatively minor given the implementation of Medical Provider Networks and the relatively modest number of cases that chiropractor serve as primary treating physicians. Impact is also blunted by the limitations on chiropractic treatment in Labor Code § 4604.5

ISSUE: Impact of the Utilization Review time limits in applying Utilization Review decisions to medical care.
Labor Code § 4610(g)

DISCUSSION: The Labor Code places strict limitations on defendants for communicating decisions to accept or delay, deny or modify recommendations for treatment. Authorization for any response other than authorization for medical treatment must be made utilizing a medical opinion. Defendants therefore have a limited timeframe to process a request for authorization, obtain a medical opinion to accept, reject, delay or modify treatment and then communicate a response to the treating physician, injured worker and/or attorney for injured worker. The question arises as to what impact on the ability to complete the Utilization Review and rely upon Utilization Review decisions occurs where the timeframes are exceeded.

STATUS: Sandhagen v. Cox and Cox Construction Company (69) Cal Comp Cases 1452 and 70 Cal Comp Cases 208 were *en banc* decisions of the WCAB holding that Utilization Review reports which were issued outside of the statutory timeframe, were not admissible on medical treatment issues before the WCAB. A petition for Writ of

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Review has issued from the Court of Appeals, the case has been argued but no new decision has come out. Pursuant to the WCAB, decision in Diggle v. Sierra Sans USB at 70 Cal Comp Cases the *en banc* decisions of the WCAB on binding on the trial level Judges and the WCAB until and unless they are reversed by a decision of the Court of Appeals, even while petition for hearing is pending after grant.

IMPACT: This case could have moderate impact on the Application of Utilization Review, particularly in litigating cases. Given the importance of UR as a cost saving tool, even a moderate impact is quite substantial in overall cost savings and therefore impact total savings significantly.

ISSUE: Presumption for American College of Occupational and Environmental Medicine Medical Treatment Guidelines:
Labor Code § 4604.5

There are several issues of relevance on the Application of the presumption of the ACOEM Guidelines. These issues include the following:

ACOEM ISSUE: Effective date of Application.

DISCUSSION: The Medical Treatment Guidelines were adopted on December 22, 2003 and became effective as a presumptively correct Medical Treatment Guideline 90 days thereafter (approximately March 22, 2004). It is unclear whether the Medical Treatment Guidelines can be applied to medical treatment, which was provided prior to the effective date of the adoption of the Medical Treatment Guidelines. This is particularly relevant in light of the provision in SB899, which rendered the Application of the Medical Treatment Guidelines as the definition of medical treatment under Labor Code § 4600 as effective for all claims regardless of the date of injury in § 47 of SB899.

STATUS: There are no cases on this issue. However, a petition for Writ of Review has been granted in the Third Appellant District in Sierra Pacific v. WCAB (Chatham) on November 3, 2005. The WCAB decision determined that the guidelines did not apply.

IMPACT: Potentially significant impact on handling of medical care for old claims with ongoing treatment..

ISSUE: Application of ACOEM Guidelines to injuries beyond 90 days.
Labor Code § 4604.5

DISCUSSION: A good deal of controversy has arisen over whether the Medical Treatment Guidelines can be applied to injuries beyond the approximate 90 days. The

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Treatment Guidelines themselves clearly apply primarily to acute injuries; however, the Guides are not limited to those types of injuries and there is a chapter specifically on chronic pain.

STATUS: There are multiple conflicting decisions at a low level of authority on this issue. The Appeals Board has yet to issue a definitive decision on whether the Treatment Guidelines can be applied beyond 90 days, but has applied the Guidelines themselves in decisions that have gone beyond that timeframe.

IMPACT: Moderate significance given the number of injuries where medical care goes beyond 90 days and the lack of other Medical Treatment Guidelines to cover these timeframes.

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ISSUE: VOCATIONAL REHABILITATION:

There are several issues involved in the repeal of vocational rehabilitation in AB227:

VR Issue: Administration of vocational rehabilitation when portions of the statutory provisions have been repealed.
Labor Code §§ 4635 through 4646 (repealed).

DISCUSSION: While it was generally accepted (And then confirmed with SB899 with the re-passage of Labor Code § 139.5 for vocational rehabilitation) that vocational rehabilitation still exists for those claims prior to 1/1/04, the repeal of the Labor Code §§ 4635 to 4646 removed much of the administrative bodywork for handling vocational rehabilitation benefits, including appealing decisions, enforcing decisions, termination of vocational rehabilitation benefits and other aspects of resolving disputes. The question therefore arises how vocational rehabilitation is to be administered where the statutory provisions had been repealed and the only provision that existed was the enabling statute creating vocational rehabilitation. The Appeals Board resolved this issue by holding that vocational rehabilitation statutes still existed for purposes of administering the vocational rehabilitation system until the vocational rehabilitation system itself was eliminated as will occur statutorily effective 1/1/09.

STATUS: The WCAB holding in Godinez v. Buffets, Inc. and Specialty Risk Services 629 Cal Comp Cases 1311 determined that Labor Code §§ 4635 to 4646 still existed as “ghost statutes” for the purpose of administering vocational rehabilitation.

IMPACT: Financial impact uncertain but significant reduction in uncertainty over administration of vocational rehabilitation benefits.

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VR Issue: Calculation of Retroactive or Delayed Vocational Rehabilitation Maintenance allowance benefits
Labor Code §§ 4642 (repealed), 139.5 (Re-enacted and amended).

DISCUSSION: Labor Code § 4642 provided that where vocational rehabilitation benefits were delayed or where there was a failure of notice by the employer of that ability to return the employee to alternate or modified work, the employee was entitled to receive vocational rehabilitation maintenance allowance benefits (VRMA) at the temporary total disability (TTD) rate. Since VRMA benefits were ordinarily paid at the maximum rate of \$246 pursuant to Labor Code § 139.5(c), and the TTD rate is currently \$840, this resulted in a significant increase in such delayed benefits. After the repeal of Labor Code § 4642, there no longer is a provision for payment of delayed benefits at such an enhanced rate. Labor Code § 139.5(c) specifically provides that VRMA is payable at a maximum rate of \$246. While the amended provisions of Labor Code § 139.5 provide for application of portions of Labor Code § 4642 and 4644, the revived portions of those statutes do not include the VRMA delay increase.

STATUS: The WCAB holding in Godinez v. Buffets, Inc. and Specialty Risk Services 629 Cal Comp Cases 1311 determined that Labor Code §§ 4635 to 4646 still existed as “ghost statutes” for the purpose of administering vocational rehabilitation. However in this situation there is a statute that is specifically on point on payment of VRMA benefits [Labor Code § 139.5(c)]. With the repeal of Labor Code § 4642 and the re-enactment of Labor Code § 139.5(c) the application of Godinez, *cited supra*, is questionable.

IMPACT: Financial impact uncertain but potentially a modest reduction in payments of past due VRMA benefits by reducing the rate to the maximum under Labor Code § 139.5(c). Less of an issue now that VR is capable of being settled by RU-122. With elimination of VR for injuries after 1/1/04, the importance of VR as a cost will diminish.

ISSUE: SUPPLEMENTAL JOB DISPLACEMENT BENEFITS:

Supplemental Job Displacement Benefits have several issues, which will require judicial determination including the following:

SJDB ISSUE: Ability to settle supplemental job displacement benefits.
Labor Code §§ 4658.5, 4658.6.

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DISCUSSION: The implementation of the supplemental job displacement benefits, which was interpreted by many as a replacement of vocational rehabilitation benefits did not come with the language prohibiting resolution of vocational rehabilitation benefits that existed for many years. However, the question arose as to whether supplemental job displacement benefits could be settled as part of a workers' compensation claim. The regulations submitted by the administrative director, provide that supplemental job displacement benefits can be resolved or settled.

STATUS: There is no current case law authority on this issue.

IMPACT: Relatively minor as it is anticipated that only a small number of employees would realistically utilize the supplemental job displacement benefit vouchers.

SJDB ISSUE: Lack of a Permanent Disability Award on entitlement to supplemental job displacement benefits.

DISCUSSION: Labor Code § 4658.5 provides that supplemental job displacement benefits are dependant upon issuance by the WCAB of Permanent Disability Award. There is no provision for payment of those benefits or calculation of benefits where an Award does not issue. The question arises whether an employee, by settling a case by means of Compromise and Release and not obtaining an Award of Benefits, automatically gives up the entitlement to supplemental job displacement benefits.

STATUS: No case authority exists on this issue.

IMPACT: Increase in frictional costs to system from confusion over access to SJDB benefits. Minor overall impact

SB 899 Issues:

SB 899 as a legislative package presents its own special issues with implementation which has and will require judicial interpretation. SB 899 included what has commonly become referred to as "Section 47" which held as follows:

"The amendment, addition, or repeal of, any provision of law made by this Act shall apply prospectively from the date of enactment of this Act, regardless of the date of injury, unless otherwise specified,

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but shall not constitute good cause to reopen or rescind, alter or amend any existing Order, Decision or Award of the Workers' Compensation Appeals Board."

Analysis of how this expression of legislative intent to apply almost all of the provisions of SB 899 to existing cases was the first order of business in obtaining legal interpretation for SB 899.

ISSUE: Retroactivity of the provisions of SB 899. Can the provisions of SB 899 be applied to existing cases which were pending before the Workers' Compensation Appeals Board where the injuries occurred prior to the effective date of SB 899 on April 19, 2004.

DISCUSSION: The ability to apply the provisions of a wide-ranging legislative package to existing cases had significant implications for the effectiveness of SB 899 and its ability to achieve its legislatively identified intent to reduce the cost of the workers' compensation system. As an urgency measure, the legislature specifically indicated that this package was to be applied to all existing cases and the question arises from a legal perspective whether existing rights of injured workers can be affected by a legislative enactment. It is well established that procedural rights can be affected (as held in Pedworth v. WCAB cited above). However, the ability to affect *substantive* rights including benefits was a more problematic question.

STATUS: The Court of Appeal addressed this issue quickly and in Kleemann v. WCAB, 70 Cal. Comp. Cases 133, held that workers' compensation is purely a "creature of statute". Therefore, the legislature has the power to alter or amend the existing rights and obligations under that statutory scheme. Kleemann, *cited supra*, specifically determined that the legislature has the power to affect existing and ongoing benefits based upon its specific intent and that in enacting SB 899 with its included language in Section 47 the legislature intended the provisions to apply to existing cases even to the extent they significantly altered existing benefits. Kleemann, *cited supra*, has been followed by a host of both published and unpublished decisions of the Courts of Appeal and followed Kleemann, *cited supra*, and relied upon the same rationale:

State of California EDD v. WCAB (Kral) 70 Cal. Comp. Cases 161 (published); Green v. WCAB 70 Cal. Comp. Cases 294; Escobedo v. Marshall's and CNA Insurance Companies 70 Cal. Comp. Cases 604 (WCAB *en banc*); Vlach v. WCAB 70 Cal. Comp. Cases 1052 and others. The appropriateness of retroactive allocation of SB 899 is no longer in dispute.

IMPACT: Major impact on overall cost savings allowing application of the majority of provisions of SB 899 intended to save on workers' compensation costs to existing workers' compensation claims. Allows for savings on Apportionment, Penalties, application of ACOEM guidelines, AMA guides to some PD ratings etc.

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ISSUE: Interpretation of “existing Order, Decision or Award of the Workers’ Compensation Appeals Board for determining those cases that could not have the provisions of SB 899 applied to ongoing determinations.

DISCUSSION: This issue became paramount when the WCAB issued its *en banc* decision in Scheftner v. Rio Linda Unified School District. This was an *en banc* decision which held an interim order closing discovery at a Mandatory Settlement Conference was a “Order, Decision or Award” for purposes of Section 47 and could not be set aside in order to reopen discovery to apply the recently enacted provisions of SB 899 in Labor Code §§ 4663 and 4664. The decision in Scheftner was jumped upon by many trial judges to limit discovery on issues involving apportionment.

STATUS: The Court of Appeal decision in Kleemann v. WCAB (cited *supra*) also addressed the issue of what constitutes a “final” Order, Decision or Award for purposes of application of the newly enacted provisions of SB 899. The Court of Appeals applied the rule of “finality of decisions” holding that only final decision of the WCAB, not interim orders, was subject to not being reopened for application of the provisions of SB 899. A decision is considered final when the right to the last appeals has expired or no longer exists. This meant that even cases which were pending on appeal on April 19, 2004 could still be subject to the provisions of SB 899 and the rights of the parties could in effect change in midstream.

IMPACT: Significant. The decision of the Court of Appeals to follow existing case law and apply the rule of finality of decisions significantly expanded the number of existing cases to which the provisions of SB 899 could be applied thereby allowing the cost-saving measures provided in that legislative package to be applied to existing cases even where there had been Mandatory Settlement Conferences and even trials prior to April 19, 2004.

ISSUE: Effective date of repeal of presumption for primary treating physician. Labor Code § 4062.9 (repealed).

DISCUSSION: In addition to the provisions applying retroactive application intent in Section 47, SB 899 also contained Section 46 which also expressed intent similarly to apply to existing cases regardless of a date of injury. Section 46 provided as follows:

“The repeal of the personal physician’s or chiropractor’s presumption of correctness contained in Section 4062.9 of the Labor Code made by this Act shall apply to all cases,

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regardless of the date of injury, but shall not constitute good cause to reopen or rescind, alter or amend any existing Order, Decision or Award of the Workers' Compensation Appeals Board."

The question of whether that section would allow current cases being litigated that had not yet been concluded to be decided without application of the primary treating physician presumption ran at a parallel time to the decisions in Kleemann above.

STATUS: The WCAB decision in Martinez v. California Building Systems 70 Cal. Comp. Cases 202 (*en banc*) specifically held that the repeal of the treating physician presumption under Labor Code § 4062.9 applies to all cases regardless of the date of injury unless a decision has become final on or before April 19, 2004. The Board defined final utilizing the same terms as expressed in Kleemann above as being where appellate rights had been exhausted or had expired prior to April 19, 2004. Martinez is binding on all trial judges and WCAB panel decisions on this issue and has not been challenged.

IMPACT: Moderate impact as the PTP presumption has been identified as a significant cost driver for medical treatment since 1994 when it was enacted

ISSUE: Obtaining medical-legal evaluations in represented cases for injuries prior to 1/1/05.
Labor Code § 4060, 4061, 4062, 4062.2.

DISCUSSION: The enactment of revised Labor Code §§ 4060 through 4068 in SB 899 altered the methodology for obtaining Qualified Medical Evaluations in both represented and unrepresented cases were rendered applicable to all existing claims as of 4/19/04 by virtue of Section 47 and the lack of any other direction by the legislature in the Labor Code. However, the provisions for obtaining medical-legal evaluations for represented cases was made effective only for injuries that occurred or were claimed to have occurred on or after January 1, 2005. Therefore, there was no statutory authority for obtaining medical-legal evaluations in represented cases after April 19, 2004 for claims that occurred prior to 1/1/05. Various theories were proposed to explain how such exams could occur but the primary response of the industry has been to assume that the existing statutes that were repealed and replaced in SB 899 continue to function much as the court determined in the Godinez case cited *supra* that the rehabilitation statutes continued to exist and operate.

STATUS: The WCAB has issued an *en banc* decision in Simi v. WCAB, 70 Cal. Comp. Cases 217 holding that the procedures in effect prior to the enactment of SB 899 would still be utilized for any medical-legal evaluations in represented cases after April 19, 2004. As commented on above, pursuant to Diggle v. Sierra Sands Unified School

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District cited *supra* WCAB *en banc* decisions are binding on trial levels and WCAB panels. However, this very issue was argued before the Courts of Appeal in mid-November in two pending Petitions for Writ of Review. It is, therefore, possible that the Courts of Appeal will determine that the WCAB was wrong in Simi and reverse that decision. Until that occurs, however, we must rely upon this case.

IMPACT: Impact on case management and litigation issues in pre-1/1/05 claims. Post 1/1/05 cases have significant limitations on the ability of the parties to obtain QME examinations and may result in delays in resolving case. Overall cost impact is minor.

ISSUE: Obtaining medical-legal reports in multi-party cases and multi-injury cases.
Labor Code §§ 4060 through 4068.

DISCUSSION: The provisions of the Labor Code as enacted by SB 899 do not make provision for how the parties are to obtain medical-legal evaluations in cases where there are multiple injuries involving the same applicant but different defendants or where there are multiple injuries involving cumulative trauma claims with one or more defendants in the same cumulative trauma period. Similarly, the legislation does not address how to obtain medical-legal reports where there are differing rights depending on the date of injury and based on the date of injury. The ability of applicants and defendants to obtain medical-legal reports for injuries prior to 1/1/05 is significantly different from the restrictions on obtaining those reports effective after that date. It is unclear whether reports which are validly obtained for injuries which occurred in, for example 2003 and/or 2004, will then also be admissible or entitled to be considered for issues in cases which would otherwise be considered companion cases with overlapping issues but where the date of injury occurred on or after January 1, 2005.

STATUS: There are no current cases pending on this issue although the decisions in the recently argued Court of Appeal claims in Nunez v. WCAB and Cortez v. WCAB argued in the Second Appellate District may have an impact in this issue depending on what the court decides.

IMPACT: Minor Cost impact principally due to moderate impact on the ability of the parties to manage litigation and disputes over benefits at least until the issue is decided by the courts. Once the rules are identified, the parties should be able to manage their claims reasonably but until such time the obtaining of medical-legal reports is fraught with uncertainty.

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ISSUE: Apportionment.

There are several issues involving apportionment which require judicial determination and clarification including the following:

ISSUE: Application of revised statutes on apportionment to existing cases.
Labor Code §§ 4063, 4064.

DISCUSSION: SB 899 did not attach specific implementation dates to the apportionment statutes and, therefore, they were subject to the general application to all existing cases applied under Section 47. The question, therefore, arose as to whether this specific benefit which potentially could significantly reduce the injured worker's entitlement to permanent disability benefits could be applied to existing cases.

This issue was the primary one raised in Kleemann v. WCAB cited *supra* and was definitively answered in that case. The application of Labor Code §§ 4063 and 4064 to existing cases can no longer be disputed based upon the overwhelming body of case law. While there were some initial Board decisions which refused to apply the new apportionment decisions on a retroactive basis, the overwhelming number of cases, including multiple decisions of the Courts of Appeal had absolutely no difficulty in doing so.

STATUS: Substantial decisional authority exists that compels application of Labor Code §§ 4063 and 4064 to existing and ongoing cases that did not become final prior to April 19, 2004.

IMPACT: Moderate as it applies apportionment under new criterion to a large number of existing cases that were pending prior to 4/19/04.

* * * * *

ISSUE: New definition of apportionment to "causation".
Labor Code § 4663.

DISCUSSION: The intent of the legislature in changing the standard for apportionment from the old provisions under Labor Code §§ 4663 and 4750 to the new language in 4663 is one which will certainly require ongoing court clarification. The decisional case law on apportionment that has developed over the last 40 years has been incremental and wide ranging. It is to be anticipated that developing case law on the issue of apportionment will similarly involve a wide-ranging discussion of various factual situations and medical scenarios. However, the principal issue of whether apportionment could be based upon causation and what the meaning of causation might be was initially addressed by the WCAB in Escobedo v. Marshall's, 70 Cal. Comp. Cases 604. In that case the WCAB determined that apportionment to causation was apportionment to "medical causation" and not proximate causation. Proximate causation was essentially

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the standard that had been used for many years testing the issue of apportionment against the standard of “but for” the injury would there be any disability and requiring substantial medical evidence in order to justify apportionment. The WCAB determined that medical causation is a different standard and allows apportionment to pathology, asymptomatic pre-existing conditions and retroactive prophylactic work restrictions – all consideration for apportionment which had previously been prohibited by case law.

STATUS: Escobedo, *cited supra* is now final having been rejected for hearing by both the Court of Appeal and the California Supreme Court. The board outlines of apportionment under Labor Code § 4663 are, therefore, set and further litigation will be essentially to fill in the details.

IMPACT: Significant impact as overall costs for permanent disability will be impacted in many cases where apportionment under the prior statutes would not have been effected. Employer’s burden for proving apportionment is therefore significantly reduced.

* * * * *

ISSUE: Calculation of apportionment to pre-existing Awards.
Labor Code §§ 4064 and 4063.

DISCUSSION: Under existing case law where applicant had a pre-existing Award of permanent partial disability and the WCAB determined that that Award still existed, the defendant was entitled to subtract the percentage of permanent disability of the old Award from the new Award pursuant to Fuentes v. WCAB (1976) 16 Cal. 3d 1, 41 Cal. Comp. Cases 42. Applicant attorneys advanced the argument that Fuentes cited *supra* was no longer controlling law in light of the repeal of Labor Code § 4750. It was, therefore, argued that rather than subtracting the percentages of disability the WCAB should subtract either the dollar value of the prior Award from the overall dollar value of the higher rating or subtract the number of weeks of disability associated with the old Award from the number of weeks associated with the new Award. Either of these calculations would have resulted in a significantly higher calculation of value for the permanent disability Award than subtracting the percentage of permanent disability.

The WCAB in Nabors v. Piedmont Lumber and Mill, 70 Cal. Comp. Cases 856 (*en banc*) determined that apportionment of such cases would be based on the *percentages of disability* rather than the use of weeks or dollar values for the permanent disability.

STATUS: While Nabors, *cited supra*, is an *en banc* decision of the WCAB and therefore binding on existing trial judges and WCAB panels, the decision in Nabors cited *supra*, has been appealed and the applicant’s Petition for Writ of Review has been granted. Additionally a decision in a different district in Dykes v WCAB, (*citation pending*), determined that for claims where there is a single employer and an employee

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sustains multiple injuries, the permanent disability benefit is to be calculated by subtraction of the dollar value of the prior award rather than the percentage of disability thereby giving the applicant the benefit of the progressive nature of the dollar values for permanent disability.

While Dykes only applies to single employer cases, it can certainly be anticipated that there will be an attempt to expand the decision to all prior awards of overlapping permanent disability where apportionment would apply, thereby significantly reducing the effects of Labor Code § 4664. There already exists a significant line of cases that ultimately eliminated a similar single employer exception that originally was part of the holding in Wilkinson v WCAB(1977) 19 Cal. 3d 491, 42 Cal. Comp. Cases 406. In a series of cases that followed, the limitations in Wilkinson, *cited supra*, were slowly eroded and the holding expanded. The same line of cases may very well apply to the holding in Dykes.

IMPACT: Moderate impact as the method for calculating apportionment will affect total costs for permanent disability. Particularly in larger cases this issue could have substantial financial impact. This decision has the potential to be significantly more expansive than the Wilkinson, *cited supra*, holding in requiring combining of successive permanent disability ratings as there is no requirement that the injuries be P & S at the same time or that the WCAB retain jurisdiction in order to combine the ratings, limitations that applied to the application of Wilkinson, *cited supra*, and its progeny cases.

* * * * *

ISSUE: Apportionment under Labor Code § 4664 for a prior Award where the new Award is under a different permanent disability rating system (use of the AMA Guides).
Labor Code §§ 4664 and 4660.

DISCUSSION: Labor Code § 4664 provides that where there is an existing Award of permanent disability it is conclusively presumed to exist and the Award is to be subtracted from subsequent Awards of permanent partial disability. However, under SB 899 for injuries after 1/1/05 and some injuries prior to 1/1/05 the parties will be using a different permanent disability rating system utilizing different criteria for assessment of permanent disability. It is also widely anticipated that many of the ratings utilizing the new permanent disability rating system with its reliance upon the AMA Guides to Evaluation of Permanent Impairment, Fifth Edition, will result in smaller permanent disability Awards. The issue therefore arises how the Appeals Board will handle the issue of apportionment where an injured worker clearly has additional trauma and additional disability but the rating is mechanically lower because of the use of a different permanent disability rating system with different criteria.

STATUS: There are no cases issued on this decision as yet.

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IMPACT: Minor impact overall to total cost of Permanent Disability.

ISSUE: Application of amended Labor Code § 5814 to penalty claims pending prior to effective date on 6/1/2004.
Labor Code § 5814

DISCUSSION: SB899 substantially amended Labor Code § 5814 to complete redefine penalties under the Labor Code for delays in payment of compensation benefits. SB899 specifically provided that this section was to be effective 6/1/2004 and that the prior section would be inoperative on that date and repealed on December 31, 2004. The question immediately arose as to the effect of this unusual statutory designation and whether any penalties or calculations for penalties which existed prior to 6/1/04 would survive that date. A flurry of penalty petitions were filed prior to 6/1/2004 on the hope that claims which had been filed prior to 6/1/2004 and which were decided prior to 12/31/2004 would apply the prior Labor Code § 5814 rather than the much more restrictive provisions of the new section.

The Court of Appeals in Green v. WCAB, 70 Cal. Comp. Cases 294 and the WCAB in Abney v. Aera Energy, 69 Cal. Comp. Cases 1552, both applied the same principal which was that all claims for penalty which were not final prior to 6/1/2004 would utilize the amended Labor Code § 5814 to determine what benefits were due. The Appeals Board in Abney, cited supra, determined that the time frame between April 19, 2004, the effective date of SB899, and 6/1/2004, the effective date of this section, was intended to allow applicant to file petitions for penalty for claims which existed more than two years before the current time but where no petition for penalty had been filed. This allowed the saving of penalties which would otherwise be barred with the effective date of the revised Labor Code § 5814 on 6/1/2004. That section had barred claims for penalty which arose more than two years ago where no petition for penalty had been filed within the two-year time frame.

STATUS: Green is now final having had the petition for hearing in the Supreme Court denied. Abney is a WCAB *en banc* decision and is also final. This case while therefore is definitely established.

IMPACT: Moderate. This statutory provision and its interpretation under Green and Abney which literally came within the first six to eight months after SB899 passed, effectively eliminated a significant class of penalties and significantly reduced the value and punitive effect of a large number of penalties pending as of 6/1/2004. Will reduce frictional costs to system by reduction of penalty litigation.

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ISSUE: Amendment to Labor Code § 3207 removing vocational rehabilitation. Labor Code § 139.5 and 3207, repeal of Labor Code § 4635 through 4644 in AB227.

DISCUSSION: As part of SB899, Labor Code § 3207 was modified to remove vocational rehabilitation from the definition of compensation. This was a hold-over legislative change from AB227 when vocational rehabilitation was repealed for injuries after 1/1/04. The reenactment of Labor Code § 139.5 ,to make certain that the rehabilitation survived for those claims prior to 1/1/04 clarified whether vocational rehabilitation still existed. However, the definition of compensation in 3207 now reads as follows:

"Compensation" means compensation under this division and includes every benefit or payment conferred upon this division upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence.

Labor Code § 3207 is located in Division 4, which is the division that defines all workers' compensation benefits with the exception of vocational rehabilitation benefits, which is contained only in Labor Code § 139.5. Further, this section no longer includes the term "including vocational rehabilitation" in its body. The question therefore arises whether the failure to define vocational rehabilitation as compensation affects the obligation to make payment on penalties in two circumstances.

Labor Code § 5814 provides for penalties in the delay of payment of "compensation." There is no specific provision including vocational rehabilitation and as vocational rehabilitation is no longer defined as compensation, the question arises whether Labor Code § 5814 continues to apply to delays in payment of vocational rehabilitation benefits.

The second potentially impacted section is Labor Code § 4650, which requires a self-imposed penalty to be made on delays in temporary disability and permanent disability. It has been a source of controversy within the workers' compensation community whether this provision also applied to vocational rehabilitation claims. The WCAB, in its *en banc* decision in Rivera v. Towers Staffing Solution, 67 Cal. Comp. Cases 1473, determined that vocational rehabilitation was a benefit effectively the same as temporary disability and the Labor Code § 4650 applied to that benefit. However, Rivera was reversed by the Court of Appeals (on other issues) and remanded. There has been no subsequent decision determining that Labor Code § 4650 benefits applied to vocational rehabilitation. In order to make that determination, the Board had to determine that rehabilitation maintenance allowance benefits were of the same character as temporary disability. However, temporary disability is now included within the definition of "compensation", whereas vocational rehabilitation is not. Arguably, this resulted in a different result on the application of Labor Code § 4650.

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STATUS: There is no decision or authority on this issue at this time.

IMPACT: Minor impact given how many vocational rehabilitation cases are settled now pursuant to former Labor Code § 4646 and the reduced impact of penalties for delays.

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ISSUE: Effective date of use of the new Permanent Disability Rating Schedule under Labor Code § 4660.
Labor Code § 4660.

DISCUSSION: Labor Code § 4660 provides that the new Permanent Disability Rating Schedule (PDRS) adopted by the Administrative Director should be effective for dates of injury after the adoption of the schedule and for some claims prior to the effective date of the schedule where specific events have not occurred. The events included a report of a treating physician indicating the existence of permanent disability, a medical-legal evaluation describing the injured worker having permanent disability, or the requirement to provide notice under Labor Code § 4061, which occurs upon the termination of temporary disability.

The response by the applicant's bar was to obtain medical reports from physicians indicating that the injured worker had sustained permanent disability but not identifying an actual level of disability because temporary disability was still ongoing. The question of whether these reports were sufficient to trigger use of the old PDRS, as well as simply the effective date of when the new schedule would apply, has been a source of controversy since SB899 passed. Given the general assumption that permanent disability ratings will be substantially lower from any cases and even non-existent for some for injuries utilizing the AMA Guidelines from the new permanent disability rating schedule, the issue of which schedule applies to pending injuries is an issue which requires a judicial determination or comment on determination.

STATUS: No decision or authority for this issue as yet.

IMPACT: This issue will have moderate impact as it will determine how cases are resolved for many injuries occurring prior to 1/1/05 but decided after that date.

* * * * *

ISSUE: Ability to rebut the permanent disability rating schedule that went into effect on 1/1/2005.
Labor Code § 4660.

DISCUSSION: Labor Code § 4660 provides that the Permanent Disability Rating Schedule is “*prima facie*” of evidence of the level of disability associated with the injured

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worker's impairment. Anticipating that there are many cases where permanent disability will be significantly reduced, the applicant's bar is aggressively arguing that the "modifier" for diminish future earning capacity does not accurately or adequately consider applicant's actual loss of earning capacity and will be presenting testimony from vocational rehabilitation counselors and/or economists on that issue in an effort to supplement the record and increase the permanent disability ratings. The ability of the applicant's bar to present this testimony will have a significant impact on both the amount of permanent disability that is awarded as well as the time, effort and expense of litigation over the issue of permanent disability.

STATUS: There is no authority on this issue as yet.

IMPACT: The impact of the decisional case law in this area will be at least moderate as it will determine both level of permanent disability benefits for many cases involving application of the new rating schedule as well as significantly affect the cost of litigation for permanent disability rating issues under the new permanent disability rating schedules and the AMA Guides for Evaluation of Permanent Impairment Fifth Edition. Presentation of evidence to rebut the Permanent disability schedule will cost between \$5000 & \$10,000 cost per case and conceivable will be awarded to applicant under Labor Code § 5811 as a litigation cost.

* * * * *

ISSUE: Application of Wilkinson v. WCAB (1977) 19 Cal. 3d 491, 42 Cal. Comp. Cases 406.
Labor Code §§ 4663 and 4664.

DISCUSSION: The landmark decision Wilkinson v. WCAB, *cited supra*, along with a line of cases that followed it¹, provided that under specific circumstances, permanent disability ratings for multiple injuries could be combined into a single rating. Combined ratings under this case had significantly greater value because of the progressive nature of the permanent disability rating schedule. Because of the increasing dollar values assigned to permanent disability ratings two 25 percent permanent disability ratings have significantly less value than a single 50 percent permanent disability rating, because the weeks assigned to each percent progressively increase as one goes up in value in the rating schedule.

¹ Wilkinson v WCAB, *cited supra*, was followed by a line of cases that expanded its holding into what is commonly called "the Wilkinson doctrine". This doctrine provides that where there were multiple injuries that became P & S at the same time and involved at least one common part of the body, the multiple injuries could be rated in a single rating thereby taking advantage of the progressive nature of the Permanent Disability monetary values.

The cases that followed and expanded Wilkinson, *cited supra*, include Harold v WCAB, 45 Cal. Comp. Cas 77, Rumbaugh v WCAB, 43 Cal. Comp. Cas 1399, Nuelle v WCAB, 44 Cal. Comp. Cas 439 Fullmer v WCAB, 44 Cal. Comp. Cas 700, Taylor v WCAB, 44 Cal. Comp. Cas 685 and , Norton v WCAB, 45 Cal. Comp. Cas 1098. Each of these cases incrementally expanded the original holding in Wilkinson to ultimately create the doctrine as it exists today.

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One of the outstanding issues under SB 899 is whether the changes in Labor Code §§ 4663 and 4664 which provide that an employer is only responsible for the percentage of permanent disability directly caused by their injury has over ruled the decisional case law in Wilkinson and its progeny.

STATUS: There are not significant cases directly on point on this issue. However the WCAB has issued some panel decisions where Petitions for Writ of Review to the appellate courts have been denied. In each case the WCAB has determined that the rule in Wilkinson, *cited supra* still applies. Arguably the holding in Dykes, *cited supra*, renders the issue of Wilkinson, *cited supra*, moot at least for those cases involving single employers with employees having multiple injuries.

IMPACT: The case law on this issue will have a moderate impact on the overall cost of permanent disability as many cases have used the principles in Wilkinson, *cited supra*, to obtain significantly increased benefits if Wilkinson, *cited supra*, no longer is viable then individual cases will be rating with assigned values. By not utilizing the progressive nature of the schedule, overall permanent disability costs would be reduced. If the holding in the Dykes, *cited supra*, is expanded, cost savings would certainly be impacted negatively

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ISSUE: 5% Increase/Decrease of Permanent Disability Award: Identification of Permanent and stationary dates for application of the increase or decrease in permanent disability ratings based upon the employer's willingness to offer regular, alternate or modified employment.
Labor Code § 4658(d) (2) and (3).

DISCUSSION: The provisions of Labor Code § 4658(d) (2) and (3) provide for the employer to make an offer to an injured worker to return to work. The employer can receive a reduction in the amount of the permanent disability benefits paid in return for this offer of employment. The event that triggers an employer's ability to make an offer of regular, modified or alternate work is the report of permanent and stationary status. The job offer must be made, in writing, within 60 days of that date. The question of how to calculate this arises because many times the permanent and stationary report is not received within 60 days from the permanent and stationary date. The question will then arise whether the permanent disability date will be based upon the date of the report, the date identified by the treating physician as being when the employee achieved a permanent and stationary status, or some other methodology for calculating this date. If the only means for calculating this date is the actual date of permanent and stationary status and the timeframe for making the offer of alternative, modified or regular employment runs from that date, there will be many circumstances where the employer simply does not have the information that an employee is permanent and stationary for

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sufficient information to make an offer of employment without a knowledge of the employee's physical abilities.

STATUS: There is no decisional authority on this issue.

IMPACT: This will have a modest impact on the employer's ability to offer alternative, modified or regular employment and obtain the benefit of a 15 percent reduction in a portion of the permanent disability Award. In cases where the employer is unable to make a reduction there will be an increase. So, the differential for each case where an offer is not made is 30 percent of the remaining permanent disability benefits more than 60 days after permanent and stationary status. Cost impact should be minor.

ISSUE: Definition of 50 employees for purposes of Labor Code § 4658(d) (2).
Labor Code § 4658(d) (2).

DISCUSSION: While this issue may be dealt with on a regulatory basis, the question of when an employer has 50 or more employees has an impact on whether the Labor Code § 4658(d) (2) were applied. The question is when counts the number of employee to be considered to determine if the employer is affected by these sections and which employees are considered to be relevant. Consideration may be given to determining the number of employees at inception of the insurance policy or certificate of self-insurance, the date of injury, the date of permanent and stationary status or some other as yet unidentified date. In terms of calculating the number of employees, the question arises whether part time employees are to be considered as well as seasonal employees in this definition.

STATUS: No decisional authority exists on this issue.

IMPACT: Relatively minor impact on overall cost on the system.

ISSUE: MEDICAL PROVIDER NETWORKS:

There are several issues under the heading of Medical Provider Networks that will require judicial determination, including the following:

MPN ISSUE: Ability to pre-designate a chiropractor or acupuncturist pursuant to Labor Code § 4601 where employer has MPN:
Labor Code § 4601

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DISCUSSION: Labor Code § 4600 allows for pre-designation in limited circumstances of a personal physician with the result that an employee whose employer has contracted with a medical provider network does not have the ability to refer that employee to receive treatment through the network. There is no provision specifically to allow pre-designation of chiropractors and acupuncturists under Labor Code § 4061 with the same results. The administrative director has proposed regulations pending to address this issue, but it is anticipated that at some point, this issue will require judicial determination.

STATUS: There is no legal authority on this issue as yet.

IMPACT: Potentially minor as predesignation has traditionally not been utilized significantly. Additionally even if employees are able to pre-designate chiropractors and acupuncturists and receive treatment outside of their employer's medical provider network, Utilization Review and the treatment caps under Labor Code § 4604.5 will limit utilization. However the limitations on selecting chiropractors and acupuncturists in Labor Code § 4600 do not exist in the same fashion that pre-designation of a primary care physician in 4600. Therefore, the limitations on selecting a chiropractor/acupuncturist would be much less stringent.

MPN ISSUE: Ability to transfer existing claims into MPNs.

DISCUSSION: One of the questions that arose immediately with the implementation of a medical provider network was whether the network could be imposed on existing cases and employees transferred in for the network. The administrative director adopted rules, which allowed for transfer of employees into the network under circumstances authorized by statute.

STATUS: There is no decisional case law on this issue, although the petition for hearing by the California Applicant's Attorney's Association to challenge the implementation of the regulations concerning medical provider network, was rejected by the Court of Appeal and California Supreme Court. However, their decision made it clear that the issue was not yet ripe and further challenges can be expected.

IMPACT: Potentially significant in that it would allow employers to have greater control over employee's medical treatment inside medical provider networks versus receiving treatment from free source physicians outside the network.

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MPN ISSUE: Pre-designation limitation to Primary Care Physician.
Labor Code § 4600(d).

DISCUSSION: Labor Code § 4600(d) imposed a new term on the requirements for selection of a pre-designated personal physician, limiting that treatment to a primary care physician. This is a term which was previously not been defined in California Workers' Compensation. The administrative director has defined the term to include limited physicians, almost none of which would currently serve as treating physicians for most injured workers. The impact of this provision to eliminate almost all orthopedist, neurologist, neurosurgeons and other specialty physicians from serving as a pre-designated personal physician such that an injured worker could receive care directly from those physicians outside the medical provider network.

STATUS: No decisional case law as yet. This is clearly an issue for regulation by the AD and pending rules by Administrative Director could resolve this issue.

IMPACT: Minor impact as predesignation has never been widespread. However for claims where an employee would predesignate a specialist rather than a primary care physician, the limitation should result in reduced costs and less leakage of employees out of the employers' MPNs.

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